FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES

(October Term, 1935)

No. 692

HARTFORD ACCIDENT & INDEMNITY COMPANY,
Appellant,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS, ex rel.
WALTER W. McLAUGHLIN, Director of Agriculture.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

~~REPLY~~ BRIEF FOR APPELLEE.

OTTO KERNER,
Attorney General of Illinois,
Attorney for Appellee.

Louis Salinger,
Assistant Attorney General,
Of Counsel.
33 North LaSalle Street,
Chicago, Illinois.

PHILLIPS BROS. PRINT, SPRINGFIELD, ILL.

SUBJECT INDEX.

	Page
Statement	1
Summary of Argument	5
Argument:	
I. Similar commission merchants acts have been construed by this court and by various state courts and sustained	7
II. The Commission Merchants Act is not violative of the Interstate Commerce Law because it affects commerce incidentally and only remotely	8
III. The State may require payment of an occupation tax from one engaged in interstate commerce	15
IV. Where a police power of the State is involved, an act of the legislature to prevent fraud on the public, although incidentally interfering with interstate commerce is, nevertheless, valid	24
V. Federal Congress has recognized the right of the States to make concurrent legislation with reference to agricultural products	27
VI. It is now to late for the principal, hence the surety, to raise the constitutionality of the act in controversy, having been in business a great many years and proceeded under the act. Therefore, what applies to the principal equally applies to the surety, and since the principal has not deemed it advisable to defend the bond the appellant is in no position so to do	29
Statutes Cited:	
Idaho, Annotated Code, 1932, Section 22, Paragraph 1001, *et seq.*	24
Indiana Statutes, 1932, Section 10-213	24
California—Producers Act, 6155—General Laws of California	24
Louisiana—Farm Product Dealers General Statutes, 1932, Section 207-208, Chapter 15	24

Page

Michigan—Compiled Laws, 1929. Section 9738.. 25

Minnesota—Mason's Minnesota Code, 1927. Section 197, *et seq*..... 25

Missouri, 4113-4115. Section 10077..... 25

New York—Cahill's Consolidated Laws of New York, 1930. Article 21, Section P. 244, *et seq*... 25

Ohio, page 5 Annotated Code, Chapter 4-A..... 25

CASES CITED.

Arnold et al. v. Hannah & Anderson, 276 U. S. 591.... 8

Bacon v. Illinois, 227 U. S. 504..... 17

Baldwin v. G. A. F. Seelig, 294 U. S. 511..... 18

Baldwin v. Standard Accident Insurance Company, 261 N. Y. S. 507..... 7

Bedford Company v. Stone Cutters Association, 274 U. S. 37..... 18

Caldwell v. Sioux Falls Stock Yards Company, 242 U. S. 559..... 25

Cargill Co. v. Minnesota, 180 U. S. 452..... 14

Cooney v. Mountain States Telep. & Teleg. Co., 294 U. S. 384..... 26

Corson v. Maryland, 120 U. S. 502..... 22

Dahnke-Walker Co. v. Bondurant, 257 U. S. 282..... 21

Detroit Int. Bridge Co. v. Corporation Tax Board, 287 U. S. 294..... 30

DiSanto v. Pennsylvania, 273 U. S. 34..... 19

East Ohio Gas Co. v. Tax Commission, 283 U. S. 465... 23

Edelman v. Boeing Air Transport, 289 U. S. 249..... 10

Federal Trades Commission v. Pacific States Paper Trade Association, 273 U. S. 52..... 22

Furst v. Brewster, 282 U. S. 493..... 22

Hall v. Geiger-Jones, 242 U. S. 539..... 25

Page

Hopkins v. United States, 171 U. S. 578 16

Interstate Busses v. Holyoke Street Railway Company, 273 U. S. 45 20

International Shoe Company v. Pincus, 278 U. S. 261 .. 28

Kansas City Steel Company v. Arkansas, 269 U. S. 148 21

Local 167, International Brotherhood of Teamsters, etc. v. United States, 291 U. S. 293 23

Merrick v. N. W. Halsey, 242 U. S. 568 25

Minnesota v. Blasius, 290 U. S. 1 8

Moore v. N. Y. Cotton Exchange, 270 U. S. 593 22

Moses v. United States Indemnity Co., 166 U. S. 571 .. 30

Moulton v. Williams Fruit Corp., 14 Pac. (2nd) 88, affirmed 21 Pac. (2nd) 936 7

Nashville C. & St. L. R. Co. v. Wallace, 288 U. S. 249 .. 10

Osborne v. Florida, 164 U. S. 650 15

Payne v. Kansas ex rel. Brewster, 248 U. S. 112 7

People v. Jarvis, 27 Pac. (2nd) 77 7

Plumley v. Massachusetts, 155 U. S. 461 11

Postal Telegraph Cable Co. v. Charleston, 153 U. S. 692 16

Raley Bros. v. Richardson, 264 U. S. 157 12

Rast v. Van Damen, 240 U. S. 342 26

Real Silk Hosiery Co. v. Portland, 268 U. S. 325 20

Robbins v. Shelby County Taxing District, 120 U. S. 489 23

Shafer v. Farmers' Grain Company, 268 U. S. 189 ... 13

Sherlock et al. v. Alling, 93 U. S. 99 14

Sligh v. Kirkwood, 237 U. S. 52 16

Sprout v. City of South Bend, 277 U. S. 163 22

Stafford v. Wallace, 268 U. S. 495 16

State ex rel. Beek v. Wagener, 77 Minn. 483 7

Page

Stockard v. Morgan, 185 U. S. 27..... 18

Texas Transport & T. Co. v. New Orleans, 264 U. S. 150 19

United States v. Bradley, 10 Pet. 343, 39 L. Ed. 448... 31

United States v. Hodson, 10 Wal. 406, 19 L. Ed. 937.. 31

Ware and Leland v. Mobile County, 209 U. S. 405..... 22

Watters v. Michigan, 248 U. S. 65..... 12

12 Corpus Juris, 762..... 29

IN THE

SUPREME COURT OF THE UNITED STATES

(October Term, 1935)

No. 692

HARTFORD ACCIDENT & INDEMNITY COMPANY,
Appellant,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS, ex rel.
WALTER W. McLAUGHLIN, Director of Agriculture.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

STATEMENT OF FACTS.

Counsel for appellant have in their brief made a complete and ample statement of the facts in this case. The constitutionality of an Act by the State of Illinois, known as the "Commission Merchants Act," passed by the legislature of the State of Illinois in the year 1919, is challenged. (Appellant's brief, Appendix A.)

The question may be stated as follows: Has the State of Illinois the right to license commission merchants who

are engaged in the business of receiving shipments both from beyond the State of Illinois and within the State of Illinois, which shipments come into their hands and are held by them as brokers for the purpose of sale, such brokers being engaged both in receiving shipments from other states, as well as within the State of Illinois?

In substance, the Act of the Legislature of the State of Illinois, among its provisions, provides that before a license shall be issued, the person or firm to whom such license is issued shall file a bond to be approved by the Director of Agriculture of the State of Illinois, providing that said commission merchant will honestly account for the handling of produce received and for the payment to the consignors of money or things of value received for goods consigned to said licensee for sale, and to secure the consignor from any fraudulent acts in such sale and handling of goods of said consignor.

The consignments generally refer to farm products and are considered as perishable merchandise. The G. H. Cross Company, a corporation, obtained a license from the State of Illinois for the years commencing on the 1st day of July, 1931, to the 1st day of July, 1932, and subsequently another license from the 1st day of July, 1932, to the 1st day of July, 1933, having previously been in business for a number of years.

On November 4, 1932, the G. H. Cross Company was adjudged a bankrupt. Thereafter two suits were brought against the bankrupt as principal, and the Hartford Acci-

dent & Indemnity Company as surety on said bonds. These actions (afterwards consolidated) were commenced in the Municipal Court and were premised upon liability incurred by the said G. H. Cross Company to shippers and consignors of farm produce. The appellant was surety on both bonds.

In the year 1931, one G. H. Segerstrom of East Farms, Washington, a consignor, was a creditor of the Cross Company for $608.15, and judgment was obtained against the Hartford Company. In the year 1932, the Cross Company became indebted to various shippers whose shipments came from the State of Illinois, and principally from shipments arriving from out of the State. The Cross Company failed to defend both of said actions in the lower court and judgments were rendered on the respective bonds for the years 1931 to 1932, and the years 1932 to 1933, in the sums of $608.15 and $5,000. (See stipulation of facts, page 12 Record, folio 72.)

For our purpose, we find it necessary to emphasize some facts, setting forth the elements of the business of commission merchants. It seems that other merchants besides the Cross Company were engaged in similar lines of business. The perishable condition of the commodities makes it necessary for commission merchants to dispose of the products quickly and to the best interest of their consignors. Much reliance, therefore, must be given to their activities, and to the stability, honesty and fair dealing on their part as brokers. It is common knowledge that a farmer is usually located in small communities not equipped to give him in-

formation as to the credit and financial responsibility of his factor or broker. If the broker is dishonest, he can, by improper market manipulations, easily defraud the farmer. The case of the shipment of apples referred to in the stipulation of facts is typical of the nature of the broker's business. (Statement of Claims, Transcript 1 and 22.)

One G. H. Segerstrom, plaintiff in the first suit, made a shipment of apples to the Cross Company, which apples were placed in cold storage as was the custom of merchants handling carloads of apples. The Cross Company deducted charges for such service, including cost of cold storage, and made an accounting. Some months passed before the consignor received an accounting for such consignment, but no payment therefor, the apples having been shipped on or about October 13, 1931, and were sold at different dates prior to July 13, 1932 (about nine months) for the purpose of getting the best price. (Stipulation—Transcript 16, Paragraph 12.)

The stipulation of facts is silent as to whom and where such apples were sold, but from the nature of such transactions, we must assume that the merchant receiving carloads of apples, divided them into smaller lots and then disposed of them at different times, as was done in the Segerstrom case.

SUMMARY OF ARGUMENT.

I.

The similar Commission Merchants Acts have been construed by this Court and by various state courts, and sustained.

II.

The Commission Merchants Act is not violative of the Interstate Commerce Law because it affects commerce incidentally and only remotely.

III.

The State may require payment of an occupation tax from one engaged in interstate commerce.

IV.

Where a police power of the state is involved, an Act of the legislature to prevent fraud on the public, although incidentally interfering with interstate commerce is, nevertheless, valid.

V.

Federal Congress has recognized the right of the State to make concurrent legislation with reference to agricultural products.

VI.

It is now too late for the principal, hence the surety, to raise the constitutionality of the Act in controversy, hav-

ing been in business a great many years and proceeded under the Act. Therfore, what applies to the principal equally applies to the surety. And since the principal has not deemed it advisable to defend the bond the appellant is in no position so to do.

ARGUMENT.

I.

SIMILAR COMMISSION MERCHANTS ACTS HAVE BEEN CONSTRUED BY THIS COURT AND BY VARIOUS STATE COURTS AND SUSTAINED.

We believe that this court has approved the doctrine as laid down in the case of *Payne* v. *Kansas ex rel Brewster,* 248 U. S. 112, and courts of various states followed along the same line of reasoning. We refer to the cases of *Baldwin* v. *Standard Accident Insurance Company,* 261 N. Y. S. 507, affirmed, 237 App. Div. 334, and *Moulton* v. *Williams Fruit Corp.,* 14 Pac. (2nd) 88, affirmed 21 Pac. (2nd), 936 and *State ex rel Beek* v. *Wagener,* 77 Minn. 483; *People* v. *Jarvis,* 27 Pac. 2nd, 77.

This court in the case of *Payne* v. *Kansas ex rel Brewster,* 248 U. S. 112, in a memorandum opinion sustaining a similar statute of the State of Kansas said: (at page 113)

> "Manifestly, the purpose of the state was to prevent certain evils incident to the business of commission merchants in farm products by regulating it. Many former opinions have pointed out the limitations upon powers of the states concerning matters of this kind, and we think the present record fails to show that these limitations have been transcended. *Rast* v. *VanDeman & L. Co.,* 240 U. S. 342, 60 L. ed. 679, L. R. A. 1917A, 421, 36 Sup. Ct. Rep. 370, Ann. Cas. 1917B, 455; *Brazee* v. *Michigan,* 241 U. S. 340, 60 L. ed. 1034, 36 Sup. Ct. Rep. 561, Ann. Cas. 1917 C. 522; *Adams* v. *Tanner,* 244 U. S. 590, 61 L. ed. 1336, L. R. A. 1917F, 1163, 37 Sup. Ct. Rep. 662, Ann. Cas. 1917D, 973."

This case is quoted with approval in *Arnold et al* v. *Hannah & Anderson,* 276 U. S. 591, 592.

We fail to find a single case juridically decided by any court of last resort adversely on the validity of similar statutes, although such statutes have been enacted by numerous states and have remained in force for many years.

However, we find it incumbered on us to make a lengthy argument in this case for the reason that the appellants have raised some issues which may not have been decided by this honorable Court in the Kansas case and in order to do so, we have deemed it advisable to treat at length the question as to whether the Statute of Illinois is a burden on interstate commerce.

II.

THE COMMISSION MERCHANTS ACT IS NOT VIOLATIVE OF THE INTERSTATE COMMERCE LAW BECAUSE IT AFFECTS COMMERCE INCIDENTALLY AND ONLY REMOTELY.

The State joins issue on the argument made on point I by the appellant and says that the Act which the Court is required to construe is not violative of any of the provisions of the Interstate Commerce Law, nor is the same a burden on commerce. The Commission Merchants Act covers a broad field and covers both merchants receiving produce in interstate as well as interstate shipments.

This Court, in the case of *Minnesota* v. *Blasius,* 290 U. S. 1, decided in the October 1933, term, annunciated the doctrine of merchandise coming *to rest* in the State. Chief

Justice Hughes rendered the opinion of the Court. The facts are fully stated in the opinion of the Chief Justice.

The Court finds referring to the facts, speaking of cattle, which came to rest in the State, says on p. 6:

> "That they were held at his pleasure and that he would sell to anyone, resident or non-resident, who was the highest bidder; that Blasius did not buy the cattle for the purpose of export or shipment to another state; and that after their purchase by him and until he resold the cattle were 'at the absolute and complete rest in the yards at South St. Paul' and 'were a part of the general mass of cattle in the state and locally owned.' "The Court also found that the cattle were handled by the defendant as a part of the chain of title from the original purchaser thereof to the final consumer thereof' and that such handling was 'a necessary factor in the center of the chain commerce from West to the East and South.' "

Reasoning from this decision of such late date, one can come to only one conclusion—that the Supreme Court of the United States has distinguished to a large degree all previous cases in conflict therewith. Analogous to the one at bar it seems to law down the broad principles that where the merchandise has come into the state "for rest in the state" as was done in the Segerstrom and other consignments to the Cross Company, then, at that point, the interstate nature of the shipment ceases and it comes under the supervision of the rules and laws of the state in which it came at rest. We submit to this Court that this case is a leading one and negatives the arguments made by appellant in their Point I in which they cite numerous cases to sustain their contention.

Nashville C. & St. L. R. Co. v. *Wallace,* 288 U. S. 249, is a case wherein the State of Tennessee imposed an excise tax on gasoline shipped by a railroad which gas was temporarily stored in the State, but used by said railroad in interstate commerce. The Court, at page 266, said:

> "The gasoline, upon being unloaded and stored, ceased to be a subject of transportation in interstate commerce and lost its immunity as such from state taxation * * * the fact that the oil was, later withdrawn from storage for use some within and some without the State part of it thus becoming again the subject of interstate transportation did not affect the power of the State to tax it all before that transportation commenced. Neither the appellant the shippers nor the carrier at the time of the shipment of the gasoline from points of origin arranged a destination for any part of the oil other than the appellant's storage tanks in Tennessee. Although in the usual course of business a variable and undefined part of it when seggregated for that purpose would again be transported across state boundaries appellant was free to distribute the oil either within or without the state for use in its business or for any other purpose. As nothing in the transaction before the withdrawal from storage in Tennessee can be said to have given any ascertainable part of the gasoline a destination to points beyond the state the case is distinguishable from Carson Petroleum Co. * * *"

Reading a little further this Court's opinion uses the following language:

> "It cannot be doubted that when gasoline comes to rest in storage the state was as free to tax notwithstanding its prospective use as an instrument of interstate commerce as it was to tax appellant's right of way rolling stock or other instruments of interstate commerce which are subject to local property tax." (Citing decisions.)

The last mentioned case was quoted with approval in *Edelman* v. *Boeing Air Transport,* 289 U. S. 249, 251 and

252, involving the question as to whether the State of Wyoming could tax gasoline used by the Transport Company and stored temporarily in Wyoming for the purpose of being used in interstate transportation by the Boeing Company while conducting air mail and transportation of passengers in interstate commerce. The Court said, at page 252:

> "The stored gasoline is to be deemed 'used within the state and, therefore, subject to the tax when it was withdrawn from the tanks' (citing various decisions)."

In *Plumley* v. *Massachusetts,* 155 U. S. 461, 15 S. Ct. 154, 39 L. Ed. 223, Mr. Justice Harlan, writing the opinion of the Court on question here at issue said, on page 468:

> "If any one thinks that oleomargarine, not artificially colored so as to cause it to look like butter, is as palatable or as wholesome for purposes of food as pure butter, he is, as already observed, at liberty, under the statute of Massachusetts, to manufacture it in that State, or to sell it there in such manner as to inform the customer of its real character. He is only forbidden to practice, in such matters, a fraud upon the general public. The statute seeks to suppress false pretenses and to promote fair dealing in the sale of an article of food. It compels the sale of oleomargarine for what it really is, by preventing its sale for what it is not. Can it be that the Constitution of the United States secures to any one the privilege of manufacturing and selling an article of food in such manner as to induce the mass of people to believe that they are buying something which, in fact, is wholly different from that which is offered for sale? Does the freedom of commerce among the states demand a recognition of the right to practice a deception upon the public in the sale of any articles, even those that may have become the subject of trade in different parts of the country?"

The case of *Watters* v. *Michigan*, 248 U. S. 65. A city ordinance was enacted regulating peddling and canvassing from house to house for sale of goods in the City of Munsing, Michigan. In this case the Court said: Page 66

> "It may be assumed that the greater part of his business was interstate commerce and free from any obligation that the ordinance imposed, but in the course of his business, he did sell two cans of toilet cream that were at rest in the State before the selling and it is admitted that this transaction was not protected from state legislation." Citing, *Bacon* v. *Ill.*, 227 U. S. 504.

In the case at bar, it is admitted that the G. H. Cross Company did some intrastate business and it is further evidenced that it did handle the apples from Segerstrom by leaving them at rest in the State of Illinois in cold storage.

The case of *Raley Bros.* v. *Richardson*, 264 U. S. 157, is similar in facts to the instant case. It seemed that the facts show the State of Georgia imposed a flat tax of $100 "upon any broker or commission merchant buying or selling merchandise on commission for another or engaged in the business of receiving or distributing articles of merchandise shipped to said broker or merchant for distribution on account of shipper." An injunction was filed seeking to restrain the state from prosecuting the broker for failure to pay said tax. In this case, the contention was that the tax is laid on all brokers and commission merchants in the state on business done by them, whether interstate or intrastate without separating one from the other. We quote from the opinion of Justice Sutherland as follows: Page 159.

"The complainants were definitely engaged in the domestic business described in the statute and were liable to the tax, irrespective of the extent of it and whether they engaged in interstate business in addition or not. That the former was small in comparison with the latter makes no difference; nor does the fact that both were carried on at the same time and in the same establishment. If the two were not distinct, by the former a mere incident of the latter, the burden was upon complainants to furnish the proof; in which case a different question would arise. *Kehrer* v. *Stewart*, 197 U. S. 60, 69. Incidentally, one cannot avoid a tax upon a taxable business by also engaging in a non-taxable business."

We quote, therefore, with approval from *Shafer* v. *Farmers' Grain Company*, 268 U. S. 189, on page 201 (cited by appellant page 34) where the Court says as follows:

"In *Munn* v. *Illinois*, 94 U. S. 113, 123, 135, the question was whether, as respects an elevator devoted to storing grain for hire, the State could regulate the storage charge where part of the grain reached the elevator, or was destined to leave it, through the channels of interstate commerce. The Court held such a regulation admissible because of the public character of the elevator and because interstate commerce was affected only incidentally and remotely. No restriction on buying or shipping was involved. In *Cargill Co.* v. *Minnesota*, 180 U. S. 452, the Court had before it a State statute, much of which had been pronounced unconstitutional by the State Court. In sustaining a provision which remained, the Court said, p. 470: 'the statute puts no obstacle in the way of purchase by the defendant company of grain in the State or the shipment out of the State of such grain as it purchased.' Plainly the case is not in point here. In *Merchants Exchange* v. *Missouri*, 248 U. S. 365, the statute involved required that public weighers appointed for the purpose should do the weighing and issue weight certificates at elevators used for storing or transferring grain for hire, and prohibited any

> other person from issuing weight certificates at an elevator where a public weigher was stationed. Objection was made to the prohibition on the ground that as applied to grain received from or shipped to points without the State it burdened interstate commerce. Of course the objection was overruled, the statute being an admissible regulation of the business of conducting an elevator for hire, like the statute considered in *Munn* v. *Illinois.*"

And the Supreme Court of the United States in *Cargill Co.* v. *Minnesota,* 180 U. S. 452, had under its consideration the right of the State of Minnesota to license warehouses. The question of the burden on commerce arose, and we quote from said decision at page 470:

> "It is also contended that the requirement of a license from the defendant company is inconsistent with the power of Congress to regulate commerce among the states. This view cannot be accepted. The statute puts no obstacle in the way of the purchase by the defendant company of grain in the state or the shipment out of the state of such grain as it purchased. The license has reference only to the business of the defendant at its elevator and warehouse. The statute only requires a license in respect of business conducted at an established warehouse in the state between the defendant and the sellers of grain. We do not perceive that in so doing the state has entrenched upon the domain of Federal authority or regulated or sought to regulate interstate commerce. In no real or substantial sense is such commerce obstructed by the requirement of a license."

In the case of *Sherlock, et al* v. *Alling,* 93 U. S. 99, this Court said at page 104:

> "It may be said, generally that the legislation of a State, not directed against commerce or any of its regulations, but relating to the rights, duties, and liabilities of citizens, and only indirectly and remotely af-

fecting the operations of commerce,is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce foreign or interstate, or in any other pursuit."

To the like effect is the early case of *Munn* v. *Illinois*, 94 U. S. 113, in which this Court approved the right of the State of Illinois to regulate warehouses.

III.

THE STATE MAY REQUIRE PAYMENT OF AN OCCUPATION TAX FROM ONE ENGAGED IN INTERSTATE COMMERCE.

This right was recognized in the case of *Watters* v. *Michigan*, 248 U. S. 65, cited by us under Point I page 12 also in the case of *Raley & Bros.* v. *Richardson*, 264 U. S. 157, cited by us under Point 1, Page 12, *supra*.

In the case of *Osborne* v. *Florida*, 164 U. S. 650, in which this court sustained an annual license tax enacted by the statute of Florida, providing that a person engaged in certain occupations shall be licensed and pay a tax. The contention was made that an agent of an express company was engaged as such in interstate commerce and therefore should not be amenable to the statute. This court, at page 654, says:

"It has added, however, that under the provisions of the statute, if the company engaged in business within the State of a local nature as distinguished from an interstate or foreign kind of commerce, it becomes subject to the statute so far only as concerns its local business, notwithstanding it may at the same time engage in interstate or foreign commerce. In other words, this statute as construed by the Supreme Court of Florida does not exempt the express company from

> taxation upon its business which is solely within the State, even though at the same time the same company may do a business which is interstate in its character, and that as to the latter kind of business the statute does not apply to or affect it. As thus construed we have no doubt as to the correctness of the decision that the act does not in any manner violate the Federal Constitution."

In the case of *Postal Telegraph Cable Co.* v. *Charleston,* 153 U. S. 692, the Court sustained the right of the City of Charleston to require a license of the Postal Telegraph Cable Co. of New York, a New York corporation. The contention was made that where the company merely maintained an office, it was immune from taxation on the ground that it was engaged in interstate commerce and that its city offices are merely initial points for sending and receiving messages. This Court ,at pages 699, 700, says:

> "If the business done wholly within a state is within the taxing power of the state, the courts of the United States cannot review or correct the action of the state in the exercise of that power."

The case of *Sligh* v. *Kirkwood,* 237 U. S. 52, cited by Mr. Justice Wilson in his opinion, recognizes the right of the state to regulate certain lines of business even though in so doing they may incidentally interfere with interstate commerce.

Counsel for the appellant take exception to the decision of his Honor Justice Wilson, who relied on the case of *Hopkins* v. *The United States,* 171 U. S. 578, and cite in approval thereof *Stafford* v. *Wallace,* 258 U. S. 495 (page 15—Appellants brief.) The decision of this Honorable Court at page 524 in the Stafford case, *supra,* says as follows:

"So, again, the line is distinct between this case and *Hopkins* v. *United States*, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40. All that was decided there was that the local business of commission merchants was not commerce among the states, even if what the brokers were employed to sell was an object of such commerce. The brokers were not like the defendants before us, themselves the buyers and sellers. They only furnish certain facilities for the sales. Therefore there again the effect of the combination of brokers upon the commerce was only indirect and not within the act."

And it may be mentioned that this Court in Stafford case approves the doctrine as laid down in *Bacon* v. *Illinois*, 227 U. S. 504, 57 L. ed. 615, 33 Sup. Ct. Rep. 299, wherein the nature of the business transacted by Bacon is to a large degree similar to the business transacted by the Cross Company and other commission merchants, and this Court seems to sustain the contention made by the State of Illinois that where merchandise comes at rest in the state to be disposed of it is no longer immune from taxation because in transit in interstate commerce. (page 526.) The Court in Stafford case, *supra*, cites many cases to sustain this doctrine in its decision and we quote from the decision of the Court as follows:

"Thus, take the case of *Bacon* v. *Illinois*, 227 U. S. 504, 57 L. ed. 615, 33 Sup. Ct. Rep. 299. Bacon had purchased grain in transit from a western state to the east. He exercised the power under his contract to stop the grain in Illinois and put it in a grain elevator there. He intended to send it on to some other state for sale. He might have changed his mind. He did, however, after a time, send it out of the state. The

> grain was taxed while it was in Illinois. The question was whether it was immune from taxation because in transit in interstate commerce. Following the cases of * * * it was held that property in a state which its owner intends to transport to some other state, but which it not in actual transit, and in respect to the disposition of which he may change his mind, is not in interstate commerce just because of the intention of its owner, and may, therefore, be taxed by the state where it is."

It seems to be the doctrine that where one intends "to transport to some other state but it is not in actual transit and in respect to the disposition of which he (the owner) may change his mind, is not in interstate commerce just because of the intention of its owner and may therefore be taxed by the state where it is."

One can readily disregard the case of *Bedford Company* v. *Stone Cutters Association,* 274 U. S. 37, advanced by counsel, for the reason that the facts in said case are so remote as to render no enlightment as to the legal conclusions reached in the Hopkins case.

The case of *Stockard* v. *Morgan,* 185 U. S. 27, (cited by counsel) may be distinguished from the instant cases for the reason that in the case cited, the merchandise never came *to rest* within the State of Tennessee. The brokers were simply selling agents with regard to the interstate shipments and shipments were in no way under control of the broker.

We can answer likewise the case of *Baldwin* v. *G. A. F. Seelig,* 294 U. S. 511, quoted by counsel. This is a case in

which a *discriminatory tax* is made against a merchant importing milk from Vermont where the production price was lower than the New York price, and consequently the Act of New York State ought to be enjoined was one of a discrimination. The decision of the Court in this case seems to sustain our contention rather than that of appellants and we take the privilege of calling this Honorable Court's attention to the decision at page 526 in which the Court says:

> "A state tax upon merchandise brought in from another state, or upon its sales, whether in original packages or not, after it has reached its destination and is in a state of rest, is lawful only when the tax is not discriminating in its incidence against the merchandise because of its origin in another State." *Sonneborn Bros.* v. *Cureton, supra,* at p. 516. *Cf. McDermott* v. *Wisconsin,* 228 U. S. 115, 133; *Bowman* v. *Chicago & N. W. Ry. Co.,* 125 U. S. 465, 491; *Brimmer* v. *Rebman,* 138 U. S. 78; *Savage* v. *Jones, supra,* at p. 525; *Western Union* v. *Foster,* 247 U. S. 105, 114; *Pacific Co.* v. *Johnson,* 285 U. S. 480, 493.

Counsel also states with approval the case of *Texas Transport & T. Co.* v. *New Orleans,* 264 U. S. 150. To this statement of counsel we find a distinction from the regulatory laws in the instant case. In the Texas case, the right of a municipality to impose a license tax upon an agent of a steamship company soliciting business, acting purely as agent for foreign companies, is questioned, and from the facts, it is admitted that the said agent was engaged in interstate business and had no relationship to local business.

To the like effect is the case of DiSanto v. Pennsylvania, 273 U. S. 34.

We likewise contend the case of *Real Silk Hosiery Co.* v. *Portland;* 268 U. S. 325, is not a commanding case because in this case it is purely a question as to whether or not a non-resident merchant shall have a right to send salesmen into a community for the purpose of soliciting orders to be shipped from out the state to its customers within the state. Such an effort by the state to prohibit a transaction of this kind, makes a discriminatory tax and a burden against the merchants beyond the state which has been frequently condemned by this Court.

The cases of *Real Silk Hosiery Co.* v. *Portland, supra,* and *Shafer* v. *Farmer's Grain, supra* and *DiSanto* v. *Pennsylvania, supra,* have been treated at length with approval in the case of *Interstate Busses* v. *Holyoke Street Railway Company,* 273 U. S. 45, 71 L. ed. 530. In this case an effort was made to restrict law enforcing officers from molesting a motor bus company operating intrastate as well as interstate, and taking fares between Hartford, Conn., and Greenfield, Massachusetts. The court makes a pronounced distinction from the cases above cited and the court uses the following language at page 51:

> "It is not shown that the two classes of business are so commingled that the separation of one from the other is not reasonably practicable or that appellant's interstate passengers may not be carried efficiently and economically in busses used exclusively for that purpose or that appellant's interstate business is dependent in any degree upon the local business in question. Appellant may not evade the Act by the mere linking of its intrastate transportation to its interstate or by the unnecessary transportation of both classes by means of the same instrumentalities and employes."

Counsel cites the case of *Dahnke-Walker Co.* v. *Bondurant,* 257 U. S. 282, this case reaffirms fundamental law involving the usual question as to what is "doing business within the State without having complied with the foreign corporation law."

This question was decided by this Honorable Court on one point only at page 291.

> "A corporation of one State may go into another, without obtaining the leave or license of the latter, for all the legitimate purposes of such commerce; and any statute of the latter State which obstructs or lays a burden on the exercise of this privilege is void under the commerce clause." (Citing various decisions.)

To this principle of law, there can be no denial.

But this Court, in the case of *Kansas City Steel Company* v. *Arkansas,* 269 U. S. 148, cites with approval the Dahnke-Walker case, but distinguishes this case when the question is involved as to a corporation entering into business in another state and not obtaining a license where such a business become an intrastate business.

In the Kanas City Steel case, *supra,* the Court, at page 152, says:

> "So far as concerns the question here involved, the situation is equivalent of what it would have been if the materials had been shipped into the State and held for sale in a warehouse, and had been furnished to the subcontractor by a dealer. We think it plain that the plaintiff in error did business of a local and intrastate character in Arkansas before it obtained permission."

The reasoning in the Kansas City Steel case, seems to follow the rule that the business of a commission merchant being such that it becomes a local business and not an interstate business.

The Illinois statute is void of any prohibition against any person or resident or non resident entering into the State of Illinois for the purpose of creating a commission business.

The case of *Sprout* v. *City of South Bend*, 277 U. S. 163, does not deny our contention that one can require payment of an occupation tax from one engaged in both interstate and intrastate commerce. On page 171 the Court says:

> "The Supreme Court of Indiana, far from construing the ordinance as applicable solely to busses engaged in intrastate commerce, assumed that it applied to busses engaged exclusively in interstate commerce and that Sprout was so engaged. The privilege of engaging in such commerce is one which a State cannot deny."

The business of commission merchants is purely local, the rule in the Sprout case does not apply to their business. Counsel cites *Federal Trades Commission* v. *Pacific States Paper Trade Association*, 273 U. S. 52. We think the language this court uses at page 65 is significant. There the Court cites with approval the cases of *Ware and Leland* v. *Mobile County*, 209 U. S. 405, and *Moore* v. *N. Y. Cotton Exchange*, 270 U. S. 593.

The case of *Furst* v. *Brewster*, 282 U. S. 493 and *Corson* v. *Maryland*, 120 U. S. 502, cited by counsel are manifestly

in line with the case of *Robbins* v. *Shelby County Taxing District,* 120 U. S. 489, and other cases along this line.

We find no fault with the law as applied to the facts in those cases, but call the Court's specific attention to the fact that the Corson case limits its decision purely to the facts involved in that case. It does not apply to the instant question as to the right of requiring of local merchants before entering into a business to obtain a license.

In the case of *East Ohio Gas Co.* v. *Tax Commission,* 283 U. S. 465, we urge that in this case the Court consider the following statement made at page 472. This Court says as follows:

> "The business of supplying, on demand, local consumers is a local business, even though the gas be brought from another State and drawn for distribution directly from interstate mains; and this is so whether the local distribution be made by the transporting company or by independent distributing companies. In such case the local interest is paramount, and the interference with interstate commerce, if any, indirect and of minor importance."

In the case of *Local 167, International Brotherhood of Teamsters, etc.* v. *United States,* 291 U. S. 293, cited by counsel, the Court at page 297 limits its decision in the following language:

> "It may be assumed that some time after delivery of carload lots by interstate carriers to the receivers, the movement of the poultry ceases to be interstate commerce." (Citing many decisions).

While counsel for the appellant in arguing their point 1 have made learned statements and have indulged in con-

siderable research, the various decisions cited by them are remote when they fail to show in these various decisions a single case in which the courts have held that the State may not under its police power license said businesses such as commission merchants, even though in so doing a burden may be incidentally be placed upon interstate commerce, nor have they been able to refute the doctrine that when merchandise comes to rest it ceased to be an instrument in interstate commerce.

IV.

WHERE A POLICE POWER OF THE STATE IS INVOLVED, AN ACT OF THE LEGISLATURE TO PREVENT FRAUD ON THE PUBLIC, ALTHOUGH INCIDENTALLY INTERFERING WITH INTERSTATE COMMERCE IS, NEVERTHELESS, VALID.

May we call this Court's attention to the fact that various other states in the exercise of police power have regulated commission merchants. To the same effect, are the statutes of various other states, a few of which we may mention:

Idaho, Annotated Code, 1932, Section 22, Paragraph 1001, et seq.;

Indiana Statutes, 1932, Section 10—213;

California—Producers Act, 6155—General Laws of Calif.;

Louisiana—Farm Product Dealers General Statutes, 1932, Section 207-208, Chapter 15;

Michigan—Compiled Laws, 1929. Section 9738;

Minnesota—Mason's Minnesota Code, 1927. Section 197, et seq.;

Missouri, 4113-4115. Section 10077;

New York—Cahill's Consolidated Laws of New York, 1930. Article 21, Section P. 244, et seq.;

Ohio, Page 5 Annotated Code, Chapter 4-A.

A few of the other States have similar provisions. We cannot help but think that the law was enacted in furtherance of safeguarding credulous farmers against fraud. The United States Courts have recognized the right of the State to license and tax persons engaged in business in which the public may be defrauded. We respectfully refer to the well known cases of *Hall* v. *Geiger-Jones,* 242 U. S. 539; *Merrick* v. *N. W. Halsey,* 242 U. S. 568; and *Caldwell* v. *Sioux Falls Stock Yards Company,* 242 U. S. 559. These are leading cases and are well known to the courts and in which the Supreme Court of the United States recognized the right of the State to create departments requiring licenses for persons engaged in the business of selling securities. They are similar and involved the so-called Blue Sky Law. In the Geiger-Jones case, at page 557, the Court answers the burden clause on interstate commerce in the following manner:

"The next contention of appellees is that the law under review is a burden on interstate commerce, and therefore, contravenes the commerce clause of the Constitution of the United States. There is no doubt of the supremacy of the national power over interstate commerce. Its inaction, it is true, may imply prohibition of State legislation, but it may imply permission of such legislation. In other words, the burden of the

> legislation, if it be a burden, may be indirect and valid in the absence of the assertion of the National power. So much is a truism; there can only be controversy about its application."

At page 558 of the latter case the Court further treats upon the question of police power regulation wherein the same may interfere with interstate commerce and Chief Justice McKenna, in the decision of this case, speaks as follows:

> "It is a police regulation strictly, not affecting them until there is an attempt to make disposition of them within the State. To give them more immunity than this is to give them more immunity than more tangible articles are given, they having no exemption from regulations the purpose of which is to prevent fraud or deception. Such regulations affect interstate commerce in them only incidentally." (Citing cases)

Under the police power the right to impose a license and other taxation upon merchants and druggists using trading stamps, coupons or profit-sharing certificates was recognized by this court in the case of *Rast* v. *Van Damen*, 240 U. S. 342. The interstate commerce burden was argued and the statute sustained under police power even though incidentally the act in controversy affected interstate commerce.

In the recent case of *Cooney* v. *Mountain States Teleph. & Teleg. Co.*, 294 U. S. 384, this Court follows out the doctrine as heretofore pronounced by this Honorable Court, at page 394, as follows:

> "Where the tax is exacted from one doing both an interstate and intrastate business, it must appear that it is imposed solely on account of the latter; that the

> amount exacted is not increased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the tax; and that the one who is taxed could discontinue the intrastate business without also withdrawing from the interstate business. *Sprout* v. *South Bend*, 277 U. S. 163, 171, 72 L. ed. 833, 837, 48 S. Ct. 502, 62 A. L. R. 45; *East Ohio Gas Co.* v. *Tax Commission*, 283 U. S. 465, 470, 75 L. ed. 1171, 1174, 51 S. Ct. 499."

In this regard, we may not go any further than the decision stated by Justice McReynolds in the case of *Payne* v. *Kansas ex rel Brewster*, 248 U. S. 112, heretofore cited.

V.

FEDERAL CONGRESS HAS RECOGNIZED THE RIGHT OF THE STATES TO MAKE CONCURRENT LEGISLATION WITH REFERENCE TO AGRICULTURAL PRODUCTS.

We would have no difficulty in conceding counsel's argument that the Perishable Commodities Act would have superseded the Commission Merchants Acts in its intendment were it not for the fact that Congress has specifically recognized the right of the States to cover the same subject matter.

We can find no more cogent words than the words used by Congress in Section 15 of the Federal Act, "Appendix B," appellee's brief. This section provides as follows:

> "*This chapter* shall not abrogate nor nullify any other statute, whether State or Federal, dealing with the same subjects as this chapter; but it is intended that all such statutes shall remain in full force and effect except insofar only as they are inconsistent herewith or repugnant hereto." (Italics ours)

It must be noted in this regard that this Section 15 does not refer to the section of the Act alone, but includes the entire chapter.

Also significant in this regard is Section 6, Chapter B, in which the following language is used:

> "Any officer or agency of any State or Territory having jurisdiction over commission merchants, dealers, or brokers in such State or Territory * * * may file, * * * a complaint of any violation of any provision of Section 2 of this chapter * * *."

In our opinion Congress having specifically reserved the right to the States to enact laws covering the same subject matter, as hereinabove stated, the reasoning of the appellants to the effect that having taken jurisdiction over the agricultural commodities shipped in interstate commerce, the State of Illinois is bound by the Federal Act is a misconstruction of the Act.

In *Savage* v. *Jones*, 225 U. S. 501, this Court on page 533 lays down the following principle:

> "But the intent to supersede the exercise by the state of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress, fairly interpreted, is in actual conflict with the law of the state. This principle has had abundant illustration." (Citing many cases)

This doctrine is likewise followed in the later case of *International Shoe Company* v. *Pincus*, 278 U. S. 261, 265; in which opinion of the Court other cases are cited; likewise the case of *Sligh* v. *Kirkwood*, 237 U. S. 52.

In view of counsel's statement, page 45 of his brief, in which they quote from the Congressional proceedings one may well conclude that the bond provision of the Federal Act was eliminated purposely in order to give to the respective states the right to compel bonds and thereby put the burden on collecting on such bonds within the state authorities rather than the government agencies.

This conclusion seems unescapable when reading the proviso in Section 15 of the Federal Act.

VI.

IT IS NOW TOO LATE FOR THE PRINCIPAL, HENCE THE SURETY, TO RAISE THE CONSTITUTIONALITY OF THE ACT IN CONTROVERSY, HAVING BEEN IN BUSINESS A GREAT MANY YEARS AND PROCEEDED UNDER THE ACT. THEREFORE, WHAT APPLIES TO THE PRINCIPAL EQUALLY APPLIES TO THE SURETY, AND SINCE THE PRINCIPAL HAS NOT DEEMED IT ADVISABLE TO DEFEND THE BOND THE APPELLANT IS IN NO POSITION SO TO DO.

Has the surety the right to attack the constitutionality of the Act since this right is particularly within the province of the cross-company, the principal, and not the surety? We believe this is answered in Corpus Juris:

> "One attacking the constitutionality of a statute must show that it affects him injuriously and actually deprives him of a constitutional right. It is not sufficient that the statute is unconstitutional as to other persons or classes of persons. It must affirmatively appear that the person attacking the statute comes within the class of persons affected by it." 12 C. J. 762 and 763.

Counsel for the appellants urge that the statute being void must therefore relieve the principal from the bond and likewise, relieving the principal, the liability of the surety is thereby voided. We take issue with counsel in this regard because the stipulation of facts, page 15 T. R. Fol. 74, shows that the Cross Company had been in business for a number of years previous, prior to the time when liability was incurred on their bonds. They have successively from year to year conducted their business and became amenable to the conditions of the Act. It appears from the stipulation of facts that during this time, no question was raised as to the validity of the Statute under which they acted.

In the case of *Detroit Int. Bridge Co.* v. *Corporation Tax Board,* 287 U. S. 294, where the question was raised as to the validity of a tax, this Court at page 298, says as follows:

> "Indeed, appellant did not at first claim that its powers and activities are limited to foreign commerce. On the contrary it sent to the secretary of state with its annual report of 1929 the prescribed minimum fee of $10. and with that of 1930 the sum of $145.92. It did not then construe the Act as not applicable to any business within the scope of its authorization under its articles and the laws of the State, but merely that it was not liable for as much as the state taxing authorities laid against it."

Counsel, on pages 49 and 50, cite the case of *Moses* v. *United States Indemnity Co.,* 166 U. S. 571. We accept their statement with approval. A perusal of the *Moses Case* leads one to believe that the doctrine of this court is firmly

established, that a bond cannot be escaped where voluntarily entered into.

In the case of *United States* v. *Bradley*, 10 Pet. 343, 39 L. Ed. 448, Justice Story delivered the opinion of the court and after referring to the *Tingey Case*, this court lays down the doctrine. The court said, at page 360:

> "That bonds and other deeds may, in many cases, be good in part, and void for the residue, where the residue is founded on illegality, but not *malum in se*, is a doctrine well founded in the common law, and has been recognized from a very early period."

And Justice Story further, on page 363, delivering the opinion of the court, says as follows:

> "Upon the whole, upon this point, we are of the opinion, that there is no solid distinction, in cases of this sort, between bonds, and other deeds containing conditions, covenants or grants, not *malum in se*, but illegal at the common law, and those containing conditions, covenants or grants, illegal by the express prohibition of statutes. In each case, the bonds or other deeds are void as to such conditions, covenants or grants, which are illegal; and are good as to all others, which are legal and unceptionable in their purport. The only exception is, when the statute has not confined its prohibitions to the illegal conditions, covenants or grants; but has expressly, or by necessary implication, avoided the whole instrument, to all intents and purposes."

a

There does not seem to be any *malum prohibitum* in the instant case but the same appears to be a voluntary guaranty irrespective of the statute. In *United States* v. *Hodson*, 10 Wal. 406, 407, 19 L. Ed. 937, 940, this court held that a bond required by statute before a business license is issued, imposing a penalty on one exercising such bond without a license, is a voluntary bond.

We believe that the giving of the bonds in the instant cases represented a voluntary act on the part of both the principal and the sureties and the giving of such bonds could be more consistently be construed as voluntary offering and not under color of a statute.

The Cross Company had the privilege of accepting the benefit of the Commisson Merchants Act and voluntarily giving a bond for the payment of consignments, or refusing to accept consignments of merchandise and paying for them as received.

There is no extortion in this bond and we think that the case of *Moses* v. *United States, supra,* and *United States* v. *Bradley,* is in line with the Detroit Bridge case above cited.

For the various reasons cited in our argument, we believe that this case should be sustained in this Honorable Court.

Respectfully submitted,

OTTO KERNER,
Attorney General of Illinois,
Attorney for Appellee.

LOUIS SALINGER,
Assistant Attorney General,
Of Counsel.